ON CONTRACTS IN RESTRAINT OF TRADE.

IT is commonly understood that the general rule of law on this subject is, that a condition in a contract in restraint of trade is valid even if unrestricted in point of time, but is invalid if unrestricted in extent of territory. If asked to explain the latter part of this statement, the answer would probably be, without critical examination of the subject, that a condition in restraint of trade covering the whole country, kingdom, or perhaps even the whole of one of the United States, is invalid, while, in the latter case, if the condition were restricted, so as not to cover the whole of a State, it would be valid. It is the aim of this paper to show, *first*, that this is not the law; *second*, that the law is that a condition in restraint of trade, unrestricted as to territory, even though it covers the whole of a State, the United States, or the whole world, is valid *if reasonable;* while it is invalid *if unreasonable*, even though the condition cover but a part of the State or country; and, *third*, the effect of the application of this rule of reasonableness to the determination of the vital question, arising in consequence of the new-fashioned "trusts."

[1] The old error that covenants in restraint of trade are bad, is repeated even in so late a case as that of Davies *v.* Davies,[2] in 1887, by Cotton, L. J., who says, "And in the year books in Henry V.'s reign, there was a case which laid down generally that covenants in restraint of trade are bad (2 Hen. 5, Term. Pasch. pl. 26)." But the condition in that case was in fact limited to one town in space and to half a year in time, and the opinion that it was against the common law was expressed by one judge only

[1] 1 P. Wms. 181. See also the note to this case in 1 Smith's Leading Cases, 705, and 9th Am. ed., which, however, is extremely unsatisfactory, except as a list of authorities there being no elucidation of principle therein. In 2 Parsons on Contracts, 748, note (z), may be found a list of principal cases on this subject, stated in chronological order, and a table of such cases may also be found in Avery *v.* Langford, Kay's Rep. 663, at 667, 668. See also the notes by Francis Wharton to Smith *v.* Tel. Co., 11 Fed. Rep. 1, and to Sharp *v.* Whiteside, 19 Fed. Rep. 156. As to conditions in restraint of artists, etc., see 1883, McCaull *v.* Braham (N. Y.), 16 Fed. Rep. 37, and p. 42, an excellent note by B. F. Abbott. See also 3 Am. & Eng. Ency. of Law, 882, note 4.

[2] L. R. 36 Ch. Div. 359, at p. 381.

(Hull), as is explained in the note, p. 240, 4 Law Q. Rev. This is the picturesque case, so to speak, often referred to, in which this same judge swore, "per dieu si le pl' fuit icy il irra al prison tanzgr. il uest fait fine au Roy"! No extended argument could so well show with what disfavor courts of old looked upon conditions in restraint of trade.[1]

In the leading case of Mitchel *v.* Reynolds,[2] Parker, C. J., says that in many instances the general restraint throughout all England can be of no use to the obligee, — "for what does it signify to a tradesman in London what another does at Newcastle?" — thereby implying that if it did signify, the rule would not apply. He adds, "And surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." The question of the *reasonableness* of the condition in dispute is therefore here brought out as one of the points to be examined and determined. Yet for a long time this would seem to have been forgotten. But, little by little, courts, at first insensibly, then more of set purpose, inquired into the *reasonableness* of the particular condition restraining trade in question in each particular case, until now, as we shall see when we come to the late cases, the true test is recognized to be that of reasonableness.

Let us briefly review a few of the cases.

Mitchel *v.* Reynolds (1711).[3] Debt on bond. An unlimited restraint as to space was held void, while a limited restraint was held good.

Bunn *v.* Guy (1803).[4] In chancery, on a question of the marshalling of assets. An agreement not to practise law within 150 miles of London was held valid.

Pierce *v.* Fuller (1811).[5] Debt. An agreement not to run a stage on a certain route was held valid, because reasonable and useful (p. 226).

Stearns *v.* Barrett (1823).[6] Covenant. An agreement for the exclusive use in two of the United States of certain machines by one party, and the same by the other party in the other States, was held valid (p. 450).

Homer *v.* Ashford (1825).[7] Covenant. At p. 326 of the

[1] And see also the statement of the law by Morton, J., in 1837, in Alger *v.* Thatcher, 19 Pick. 51.

[2] 1 P. Wms. 181, at p. 191.

[3] 1 P. Wms. 181.

[4] 4 East, 190.

[5] 8 Mass. 223.

[6] 1 Pick. 443.

[7] 3 Bing. 322.

opinion we read: "Any deed, therefore, by which a person binds himself not to employ his talents, his industry, or his capital in any useful undertaking in *the Kingdom*, would be void, because no good reason can be imagined for any person's imposing such a restraint on himself." This implies that if there were, the restraint would be upheld.

Horner *v.* Graves (1831).[1] Assumpsit, on breach of agreement that defendant, a dentist, would abstain from practising over a district 200 miles in diameter. The condition was held to be *unreasonable*, and therefore void. Tyndall, C. J., at p. 743, said: "But the greater question is, whether this is a reasonable restraint on trade. And we do not see how a better test can be applied to the question, whether reasonable or not, than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public. . . ." It follows, then, that if the restraint interferes with the interests of the public, it is unreasonable, and will not be upheld by the courts. This is to be borne in mind when we come to the question of the powers of the courts over our new-fashioned "trusts."

Hitchcock *v.* Coker (1837).[2] Assumpsit, for breach of agreement not to carry on the trade of a druggist in Taunton, or within three miles thereof. Held reasonable and valid. See a good statement of the law by Tyndall, C. J., at p. 454.

Ward *v.* Byrne (1839).[3] Debt on bond, the condition being that the defendant was not to follow the business of selling coal for nine months. Held void, because *unreasonable*, but not because it was unlimited in space. At p. 562 Parke, B., says: "The limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party with whom the contract is made. . . ."

Whittaker *v.* Howe (1841).[4] Injunction. A restraint against practising as a solicitor in all England was held *reasonable* and valid.

Mallan *v.* May (1843).[5] Covenant. An agreement not to carry on business as a dentist in London or in any towns or places in England or Scotland where the plaintiffs might practise, was held valid as to London, because reasonable, but invalid as to

[1] 7 Bing. 735.
[2] 6 Ad. & El. 438.
[3] 5 M. & W. 548.
[4] 3 Beav. 383.
[5] 11 M. & W. 653.

the rest, because unreasonable. The old notion that a restraint unlimited as to space is necessarily invalid may be said to have been destroyed by this time. Neither of these restraints were unlimited as to space, yet one was held valid because reasonable, while the other was held invalid because unreasonable. At p. 667 Parke, B., says: "We conceive that it would be better to lay down such a limit as under any circumstances would be sufficient protection to the interest of the contracting party, and if the limit stipulated for does not exceed that, to pronounce the contract to be valid."

Jarvis *v.* Peck (1843).[1] Bill in equity, in a foreclosure suit on bond and mortgage, the condition being that the defendants would not use a certain method of converting cast iron into malleable iron. Held valid, as a sale of a business secret, although unlimited in time or space.

Green *v.* Price (1845).[2] Covenant. An agreement not to carry on the trade of a perfumer within the cities of London or Westminster, or within 600 miles thereof, was held to consist of divisible covenants, good as to London and Westminster, but bad as to the rest; following Mallan *v.* May, *supra.*[3] If the rule were, as commonly stated, that a restraint limited as to space is valid, but one unlimited as to space is void, both restraints in these two cases would be held invalid. But one is valid because *reasonable*, the other is invalid because *unreasonable.*

Lawrence *v.* Kidder (1851).[4] Covenant or assumpsit. On demurrer to the declaration. An agreement not to manufacture or sell palm-leaf beds, etc., for five years in all the territory west of Albany, in the State of New York, was held invalid, the restriction embracing too large a territory. Now, if there were any such a general principle as that sometimes asserted, that a condition in restraint of trade is valid if it covers less than the whole State or Nation, while it is invalid if it covers the whole State or Nation, this case cannot stand. It can only be supported upon the ground that the condition was *unreasonable*, with all that follows therefrom; *i.e.*, that it was more than was necessary for the protection of the complainant, and was injurious to the public.

Dunlop *v.* Gregory (1851).[5] Covenant. A contract not to run steamboats between New York and Albany was held valid,

[1] 10 Paige, 118. [2] 13 M. & W. 695, affirmed 16 M. & W. 346.
[3] 11 M. & W. 653. [4] 10 Barb. 641. [5] 6 Selden, 241.

because *reasonable*, and the restraint of the covenantor was not larger than is necessary for the protection of the covenantee.

Tallis *v.* Tallis (1853).[1] Covenant. An agreement not to canvass for the sale of books in London or within 150 miles of the general post-office, or in Dublin or Edinburgh, or within 50 miles of either, or in any town of Great Britain or Ireland in which the plaintiff might have an establishment, was held good, on demurrer, it not appearing that the restraint was unreasonable.

Whitney *v.* Slayton (1855).[2] Debt on bond. An agreement not to engage in the business of casting iron within 60 miles of Calais, Me., for ten years (it not being a part of the State densely inhabited), was held valid; not because limited in space (as well as in time), but because it was a reasonable restriction.

Alcock *v.* Giberton (1855).[3] Assumpsit. On demurrer to the declaration. An agreement not to make porcelain teeth (unlimited in time or space) was held valid. The decision of the court below, based upon the test whether the contract would be prejudicial to the public interest, was sustained. What is this but another way of saying that the contract was a *reasonable* one? This case is sometimes cited as sustainable upon the ground that it was a sale of a trade secret; but the opinion does not rest upon this ground.

Jones *v.* Lees (1856).[4] Covenant. An agreement not to make or sell slubbing-machines during the fourteen years of the patent, without using plaintiff's invention, was held valid, because *reasonable*, although unlimited as to space. Pollock, C. B., said: "If the covenant had been that neither the defendant nor his executors would make any of these machines for a thousand years, that would, no doubt, have been an unreasonable restraint. . . ."

Mumford *v.* Getling (1859).[5] Assumpsit, for the recovery of fifty pounds stipulated damages, the defendant having, in violation of his agreement, travelled for another house. Held valid, because reasonable.

Harms *v.* Parsons (1863).[6] Bill in equity to rectify an assignment. An agreement not to buy, sell, or manufacture horsehair stuff except for the benefit of the plaintiffs, within 200 miles of B., was held valid, because reasonable. The brief statement at p. 248 of the argument of the counsel for the complainant

[1] E. & B. 391.
[2] 40 Me. 224.
[3] 5 Duer, 76.
[4] 1 H. & N. 189.
[5] 7 C. B. N. S. 305.
[6] 32 L. J. Ch. 247.

is unanswerable: "A general covenant, therefore, to retire from trade altogether might reasonably be taken from a telegraphic instrument-maker; Bass' and Allsopp's Ales were known the world over, and Mudie made no difficulty in sending books round the kingdom, and even abroad; a general covenant might also be asked from them."

Keeler *v.* Taylor (1866).[1] Bill in equity for an account, etc. On demurrer to bill for an account upon an agreement to pay $50 for all scales made for any one except the complainant. The agreement was held invalid, because unreasonable.

Taylor *v.* Blanchard (1866).[2] A contract not to manufacture or sell shoe-cutters in the State of Massachusetts was held invalid. But in the light of later, more authoritative, because better-considered, cases, I submit that this and other old cases included in the list of cases at the head of this paper, as well as Bishop *v.* Palmer,[3] are not good authorities now, and would not be followed.

Wright *v.* Ryder (1868).[4] An agreement not to run a steamboat for ten years in the waters of California, etc., was held void. Although it was held that a condition in restraint of trade running through the whole State is void, the court recognized insensibly the true test to be that of *reasonableness* (p. 358). We need not examine this case further, because it was overruled in the U. S. Supreme Court, 20 Wall. 64, which we will examine when we come to it.

Leather Cloth Co. *v.* Lorsont (1869).[5] Bill in equity to restrain violation of an agreement not to carry on, in any part of Europe, the manufacture of certain leather cloth. The agreement was held valid, because reasonable. James, V. C., said (p. 90): "The truth is that all the cases, when they come to be examined, according to my view of it, establish this principle, that all restraints upon trade are bad, as being in violation of public policy, unless they are natural, and not unreasonable for the protection of the parties." So in 1886, in Smith's Appeal,[6] Trunkey, J., well states: " . . . In such case, the same public policy enables him to enter into any stipulation, however restrictive it is, proved the restriction, in the judgment of the court, is not unreasonable, having regard to the subject-matter of the contract."

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[1] 53 Penn. St. 467.
[2] 13 Allen, 370.
[3] (1888) 146 Mass. 469.
[4] 36 Cal. 342.
[5] 39 L. J. Ch. 86; s. c., L. R. 9 Eq. 345.
[6] 6 Atl. Rep. 251, at 253.

Mandeville *v.* Harman (1886).[1] Injunction, to restrain the defendant from violating his agreement not to engage in the practice of medicine or surgery in Newark at any time. The application was denied, because the reasonableness of such a restraint had not been determined in that State. But the court recognized the test to be that for which we are now contending.

Before we examine the later cases let us now sum up.

(*a.*) We see an ever-increasing tendency all through these and other cases on our lists, but which we cannot stop to examine in detail, towards an abandonment of the supposed and, indeed, commonly misstated principles of the earlier cases, and towards the consideration of each case, especially in courts of equity, upon the question of *reasonableness*, as applied to the particular case.

(*b.*) The majority of the older cases that would seem to militate against this view were cases arising at law in debt upon bond, or in covenant, in which cases the common-law court, of course, construed strictly the condition of the bond or the terms of the covenant. If it be urged in reply that "Equity follows the law," the answer is, that depends upon how this maxim is to be construed. Does it mean that equity is to follow the law, slavishly, as its master, or intelligently, as its guide? Unfortunately there has been a strong tendency, in the United States especially, to follow it as its master. In this country this probably arises from the fact that our judges and lawyers are, first and foremost, common-law judges and lawyers, and even in a court of equity they are only secondarily equity judges and lawyers. In England, under the old system, equity judges and lawyers were always first and foremost equity judges and lawyers. They were not hampered, in their application of equitable principles, by a previous strict course of education in the common law, or by the too prevailing admiration of American lawyers for the narrow and harsh principles of that essentially scholastic and metaphysical system. Therefore we find, as a general rule, that the English Chancery Courts are stronger than ours, and apply equitable principles in a broader spirit, regarding less the narrow limitations of the common law. In other words, they follow the common law as a guide, and not as a master.

(*c.*) We have examined indiscriminately cases in which the restraint was limited, and those in which it was unlimited, as to

[1] 7 Atl. Rep. 37.

space. This was done advisedly, to show that the true question is that of *reasonableness*, and not of limit in space.

We will now examine the recent leading cases which, I submit, establish the law in consonance with the views herein expressed.

Oregon Steam Nav. Co. *v.* Winsor (1873),[1] overruling Wright *v.* Ryder.[2] An agreement not to run a certain steamboat within the waters of California for ten years was held valid. In the excellent opinion of the court by Bradley, J., although the element of reasonableness is admitted (p. 69), we find the common error as to the law on this subject again perpetuated (p. 67). "A contract, even on good consideration, not to use a trade anywhere in England, is held void in that country, as being too general a restraint of trade," etc. The opinion is important because it recognizes the fact that this is substantially one country, and that it would involve too narrow a view of the subject to condemn as invalid any contract not to carry on a particular business within a particular State (p. 57). A broader view must guide us, in the present day of extended commerce, telegraphs, railroads, etc.; for the limits that were unreasonable fifty years ago are plainly reasonable now.

Roussillon *v.* Roussillon (1880).[3] An unlimited restraint against selling certain champagne was held reasonable and valid. Let it not be urged that this case has been overruled by the later case of Davies *v.* Davies.[4] "While Cotton, L. J., showing great willingness, if not anxiety, to overrule it, based his opinion upon the ground that the restriction was void, because unlimited in space, Bowen, L. J., did not put his decision on that ground, and Fry, L. J., adhered to his opinion in Roussillon *v.* Roussillon. That Davies *v.* Davies was not received in England as overruling the last-named case, see note to this case in Law Quarterly Review, Vol. 4, p. 240."[5] The case of Roussillon *v.* Roussillon is a very strong one, and without quoting from it at length, I would, however, call attention to the masterly comparison of the conflicting cases by Fry, J., and the conclusion he comes to, *i. e.*, there is no absolute rule that a covenant in restraint of trade is void if it is unlimited in regard to space.

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[1] 20 Wall. 64.

[2] 36 Cal. 342, above cited.

[3] L. R. 14 Ch. D. 351.

[4] L. R. 36 Ch. D. 359.

[5] By Stiness, J., in Herreshoff *v.* Boutineau (R. I., April 14, 1890), 19 Atl. Rep. p. 712, at 713. This case will be cited again in its order.

Diamond Match Co. *v.* Roeber (1887).[1] An agreement not to make or sell, except in the service of the purchaser, certain matches, within 99 years, in any State or Territory except Nevada and Montana, was held valid. The very able and full opinion in this case, in common with the last cases cited, dwells upon the extension of trade and commerce through the improvements made in the use of steam and electricity, and the consequent necessity of relaxing the rigor of the old doctrines on this subject.

The last case on this subject, indeed the one in which the writer cited the above cases on his brief for the complainant, and presented the above argument, is that of Herreshoff *v.* Boutineau (1890).[2] A temporary injunction was denied, the court intimating that the law was not as the complainant maintained.

The bill was for an injunction to restrain the defendant from violating his agreement not to teach the French or German languages for a year, within the State of Rhode Island. After argument, upon demurrer to the bill, the court held, in a very able opinion by Stiness, J., that neither in England nor in this country is there a rule of law that a restraint upon trade extending throughout the State is necessarily invalid. They then proceeded to examine the *reasonableness* of the restraint in question, and came to the conclusion that it was an unreasonable restraint, because it extended more protection to the complainant than he required, and thus, without benefiting him, it oppressed the respondent, and deprived people of the chance which might be offered them, to learn the French and German languages of him. Owing to the imperfect system of reporting cases in Rhode Island, no summary of points presented and of cases cited will appear in the report of this case (or of other cases) in the forthcoming volume of Rhode Island Reports, and therefore this paper may assist some one in the future, having the same ground to go over.

We conclude, therefore, that the true test, in considering the legality of a condition or covenant in restraint of trade, is not whether the restraint covers the whole State or Nation, but it is whether the restraint is *reasonable;* and in determining this question the court will inquire whether it is necessary for the protection of the complainant, and is not injurious to the public. The latest decisions of the United States Supreme Court, the Court of Chancery in England, the Court of Appeals of New York, and the Supreme

[1] 106 N. Y. 473. [2] 19 Atl. Rep., p. 712.

Court of Rhode Island, taken in their order as rendered, are decisive of this subject, especially when an analysis of the previous conflicting cases shows the doctrine here contended for to be but the fruition of the application of this principle, which, though often unconsciously, was applied in many of those cases.

What bearing has this principle upon the solution of the questions arising under "Trusts"? The learned Dr. Dwight in an article on Trusts (3 Political Science Quarterly, 592 (Dec., 1888), also published as Appendix A to the minority report of the Committee on Manufactures, 50th Congress, 2d Session, H. R. Rep. 4165, Part 2), maintains that the rules governing contracts in restraint of trade are not applicable, because persons constituting "trusts" become partners, and, is well known, partners are not subject to these rules. But with all deference to the opinion of so able and learned a writer, I cannot accept this conclusion, certainly not in those cases where a "trust" is a partnership or combination of corporations or of other partnerships. Dr. Dwight thinks it is very doubtful whether the offence of engrossing, forestalling, or regrating (buying to sell again) ever existed at the common law, independent of the statutes of 5 & 6 Edward IV., cap. 14, and that when these statutes were repealed courts had no authority to punish offenders. If this be so, in the absence of statutory authority the courts cannot now punish offenders of this class, and therefore they cannot reach "trusts," unless they do so on other grounds. On the other hand, upon proper application to a court of equity, has not that court jurisdiction to determine whether or not it is *reasonable* to allow as valid a secret combination or partnership of this nature, whereby a number of corporations or of partnerships, or even of individuals, at the expense of the public, can parcel out production, supply, and consumption of the necessaries of life, or of anything else, not according to the usual laws of demand and supply, but according to the will of an inner circle, acting under delegated authority from constituents whose right thus to delegate their power or thus to use it themselves is doubtful?

If the wit of man has brought into existence this new thing, this Frankenstein, surely the wit of man will also prove equal to the task of determining how it shall be rendered amenable to the law of the land and the public good.

Amasa M. Eaton.

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